Decision No. 373

S,
Applicant

v.

International Bank for Reconstruction
and Development,
Respondent

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Jan Paulsson, President, Francisco Orrego Vicuña, Sarah Christie, Florentino P. Feliciano, Zia Mody, Stephen M. Schwebel, and Francis M. Ssekandi, Judges. The application was received on 21 March 2007. The Applicant's request for anonymity was granted on 24 April 2007. A filing by the World Bank Group Staff Association of an Amicus Curiae Brief was accepted by the Tribunal and both parties commented thereon.

Factual Background

2. The Applicant worked in the Bank for more than 13 years from 1993 to 2007. The Bank terminated his employment in January 2007 after he pleaded guilty to a felony count of structuring financial transactions to evade reporting requirements ("Structuring") before the United States District Court for the District of Columbia ("the U.S. District Court"). Under U.S. law, financial institutions are required to file a Currency Transaction Report with the Secretary of the Treasury for all cash transactions exceeding $10,000. Structuring is the division of a cash transaction exceeding $10,000 into multiple transactions of smaller amounts for the purpose of evading federal reporting requirements.

3. The Applicant now challenges his termination before the Tribunal. The legal grounds of termination and the definition of the discretionary element of the Bank's decision in that respect are central to this case. They are articulated as follows in Staff Rule 8.01, paragraph 3:

> **03. Disciplinary Measures**
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> 3.01 Upon a finding of misconduct, disciplinary measures, if any, imposed by the Bank Group on a staff member will be determined on a case-by-case basis. *Any decision on disciplinary measures will take into account such factors as the seriousness of the matter, any extenuating circumstances, the situation of the staff member, the interests of the Bank Group, and the frequency of conduct for which disciplinary measures may be imposed*. Subject to the provisions of paragraph 3.02 below, termination of service will be mandatory, however, where it is determined that any of the following misconduct has occurred:
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> …
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> b. conviction of a felonious criminal offense.
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> 3.02 *Where termination is mandatory under this Rule, the President, or the President's designee appointed to review the case, retains full and sole discretion to determine otherwise based on particular circumstances – i.e., where an act is a felony in one jurisdiction but not in most others, or where there has been a manifest lack of due process in the relevant case.* …
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> 3.03 Depending on the circumstances of the case, one or more of the following disciplinary measures may

be taken by the Bank Group when misconduct is determined to have occurred … :

a. Oral or written censure;

b. Suspension from duty with pay, with reduced pay, or without pay;

c. Restrictions on access to the Bank's premises;

d. Restitution, forfeiture of pay or benefits, or reduction or elimination of a salary increase in respect of a prior year in which it is later determined misconduct occurred, either to penalize a staff member or to compensate the Bank Group for losses attributable to misconduct;

e. Removal of privileges or benefits, whether permanently or for a specified period of time;

f. Reassignment;

g. Assignment to a lower level position;

h. Demotion without assignment to a lower level position;

i. Reduction in future pay, including the withholding of future pay increases;

j. Termination of appointment; and

k. Loss of future employment and contractual opportunities with the Bank Group. (Emphasis added.)

4. The Applicant came to the U.S. in 1988 as a foreign student at the age of 17. His older cousin, Mr. X, an attorney well-known among Washington D.C.'s community of expatriates from the Applicant's home country, became his guardian in the U.S. The Applicant lived for a while with Mr. X while pursuing a Bachelor's degree in Computer Science. He received his degree in 1993. Later that year he joined the Bank under a Temporary appointment as an Information Analyst. The Bank converted the Applicant's appointment to Open-Ended in 1997. He was promoted to Level F in 1999, to Level G in 2002, and finally, in 2005, to Senior Operations Officer in one of the units of a Bank regional sector. Throughout his career, the Applicant received good performance ratings and was well-regarded by his colleagues.

5. According to the Applicant, over the years his relationship with Mr. X grew closer and he "grew to love and admire [Mr. X] deeply." Mr. X "became a father figure" to him. The Applicant "implicitly trusted and respected" Mr. X.

6. In 2003, Mr. X was arrested for alleged involvement in a wide-ranging scheme of providing illegal immigrants with false documentation and receiving substantial cash in return. In 2004, Mr. X pleaded guilty to 164 counts of conspiracy, labor certification fraud, immigration fraud and money laundering. He agreed to cooperate with the continuing investigation. The scope of the investigation expanded to include an inquiry into the Applicant's involvement in Mr. X's fraudulent scheme.

7. The investigation of the Applicant led to his indictment in January 2005 on 23 counts of conspiracy, labor certification fraud, money laundering, and Structuring. In July 2006, the Applicant and his legal counsel negotiated a guilty plea to a single count of felony Structuring. The U.S. Attorney's Office for the District of Columbia memorialized the terms of the plea agreement in a letter to the Applicant's counsel dated 11 July 2006 ("Plea Agreement"). The Applicant signed the Defendant's Acceptance clause of the Plea Agreement on 17 July 2006. By signing the Defendant's Acceptance clause, the Applicant stipulated that he understood and voluntarily agreed to the Plea Agreement, and that he was pleading guilty to the offense of Structuring because he was in fact guilty of that crime.

8. The Applicant also signed a "Stipulated Statement of Facts in Support of Guilty Plea" on 17 July 2006. It notably acknowledged the following:

> [The Applicant] and the United States agree that the following facts are true and correct, and that if this matter were to proceed to trial the United States would prove these facts beyond a reasonable doubt:
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> …
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> Beginning in 1998, at [Mr. X's] direction [the Applicant] would from time to time deposit into his own personal [Bank-Fund Staff Federal Credit Union ("FCU")] accounts checks which [Mr. X's] clients had made out in payment for [Mr. X's] services, and large cash payments from [Mr. X's] clients. [Mr. X] instructed [the Applicant] to split large cash deposits into amounts less than $10,000 in order to avoid disclosure paperwork that would be required for deposits that exceeded $10,000. At no time did [the Applicant] make a cash deposit in excess of $10,000 to his personal FCU accounts.
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> On or about January 6, 2000, [the Applicant] deposited into his personal FCU savings account $9,000 in cash that he had received from [Mr. X]. On or about January 7, 2000, [the Applicant] deposited into his personal FCU checking account $9,500 in cash that he had received from [Mr. X]. [The Applicant] deposited these funds in this way so as to avoid the bank's currency transaction reporting requirements. On January 7, 2000, [the Applicant] used the $9,000 to purchase [a] cashier's check … from the FCU, payable to [Mr. X]; on January 12, 2000, [the Applicant] used the $9,500 to purchase [a] cashier's check ... from the FCU, payable to [Mr. X].
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> At all times, with respect to the conduct described in this Stipulated Statement of Facts, [the Applicant] acted knowingly, unlawfully, purposefully, and not by accident, inadvertence, mistake, or other innocent reason.

9. On 19 December 2006, pursuant to the Applicant's Plea Agreement, the U.S. District Court sentenced him to serve two years of probation, pay a $5,000 fine, and complete 300 hours of community service. The Court granted a motion by the prosecutors to dismiss the remaining 22 counts of the indictment. As for Mr. X, the same Court sentenced him to serve 40 months in prison and three years' supervised release, pay court costs, and forfeit $2 million.

10. The Applicant's prosecution received some media exposure. A local newspaper published a report stating that a project manager at the World Bank had been indicted on multiple charges, including money laundering, immigration fraud and conspiracy. The Applicant's subsequent guilty plea was also the subject of a press release by a U.S. Government agency.

11. At the Bank, the Applicant's involvement in these events put his job in jeopardy. At the Applicant's request, soon after his indictment in January 2005, the Bank placed him on paid administrative leave. With the approval of the Bank, he returned to work on 16 May 2005. During the summer of 2005, however, the fact that the Applicant had resumed his work came to the attention of the President's office, which directed Human Resources ("HR") to place him back on paid administrative leave. Accordingly, on 26 September 2005, the Vice President of Human Resources ("HRSVP") informed the Applicant by memorandum that the seriousness of the charges against him had recently come to his attention and that he had decided to place the Applicant on paid administrative leave for up to six months effective immediately. On 24 March 2006, the Bank extended the Applicant's paid administrative leave. On 20 September 2006, the Bank informed the Applicant that his paid administrative leave would continue "until the criminal charges pending against [him] … are adjudicated and the Bank makes a decision regarding [his] employment with the institution."

12. Meantime, in April 2006, the Applicant's defense counsel began to correspond, and in the same month met, with the Bank's Legal Department and HR to determine whether the Applicant's prosecution and any kind of guilty plea would jeopardize the Applicant's employment with the Bank. At the April 2006 meeting, the Bank

officials briefed the Applicant's counsel that under Staff Rule 8.01, paragraph 3.01, termination is mandatory where a staff member has been convicted of a felony. They also specifically briefed the defense counsel about paragraph 3.02.

13. On 7 and 14 July 2006, around the time the Applicant was finalizing his Plea Agreement with the prosecutors, the Applicant's defense counsel wrote to the Bank's Regional Vice President of the Applicant's department, urging that the Bank maintain the Applicant's employment in the light of the following:

(i) the Applicant's termination would lead to the revocation of his G-4 visa and make him and his family subject to deportation;

(ii) Structuring, although a felony, is widely viewed as a technical, administrative violation of the highly complex rules and regulations governing financial transactions – an area in which the Applicant had no training or knowledge;

(iii) Structuring is not considered a crime involving moral turpitude. It does not inherently involve fraud upon the government, nor require knowledge of the illegality of the funds deposited;

(iv) the Applicant was involved in the Structuring at the direction of his cousin, a lawyer whom the Applicant revered as a father figure, and the Applicant did not benefit in any fashion from his alleged wrongdoing;

(v) the government did not wish the Applicant to be deported or lose his job, and contemplated allowing the Applicant to plead guilty to a misdemeanor, but ultimately concluded that there was no misdemeanor charge that applied to the Applicant's actions. It chose to adjudicate the Applicant on a Structuring charge because it is considered an administrative violation and does not require automatic deportation;

(vi) the government conceded that the Applicant had no knowledge of his cousin's fraudulent scheme or that the funds he had deposited for his cousin were derived from illegal activities;

(vii) the Applicant decided to forego a trial and accept a Plea Agreement to avoid an additional financial burden and other related stress; and

(viii) the Applicant's conduct at issue had nothing to do with his responsibilities or job at the Bank, where he is regarded as a trusted and exceptional employee.

14. On 21 July 2006, at the request of the Regional Vice President, an HR Manager responded to the letters from the Applicant's defense counsel dated 7 and 14 July 2006. The HR Manager reiterated that "[w]hile the President of the Bank, or a designee appointed by him, has the discretion to decide that termination is not warranted for a felony conviction, this discretion arises only once there has been a felony conviction and where it is shown that the act is a felony in one jurisdiction but not in another."

15. According to the Applicant, the HR Manager's letter of 21 July 2006 caused him and his counsel to research whether Structuring was a felony in other countries. On 8 September 2006, the Applicant's defense counsel wrote to the HR Manager about the outcome of their research, stating that Structuring is not a crime – much less a felony – in several countries, including Bangladesh, Cameroon, Canada, India and most, if not all, Member States of the European Union, as well as Switzerland. The Applicant's defense counsel attached legal opinions from attorneys in the first four above-named countries certifying that those jurisdictions have no criminal law similar to the U.S. prohibition on Structuring. They asked the Bank to advise them should it require legal opinions from attorneys in the European jurisdictions as well.

16. On 19 September 2006, the HR Manager responded by letter to the Applicant's defense counsel as follows:

You state that [S]tructuring … is not a felony, or even a crime, in other jurisdictions around the world. This, you submit, provides the Bank with a discretionary basis to continue [the Applicant's] employment.

> I would first of all like to assure you that the points made will be given careful consideration. In the course of our review of your letter, we have noted that you state that you have been advised that [S]tructuring would not be a crime in United Kingdom, France, and Switzerland and that the same is true throughout the European Union. You have offered to provide written opinions from these jurisdictions. We would like to accept this offer and request that you forward the opinions to us as soon as you receive them.
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> In addition, your letter of September 8, 2006 notes that the United States "government has conceded that [the Applicant] had no knowledge of [Mr. X's] fraudulent scheme [….]" Your earlier letter of July 7, 2006 further indicates that the United States government has informed you that they do not wish [the Applicant] to be deported or to lose his job, and would have been agreeable to a lesser charge to help him avoid such adverse consequences, but there is no misdemeanor charge applicable to [the Applicant's] actions. It would be helpful if you could provide a written statement from the prosecutor responsible for your client's case that confirms the views of the United States Attorney about [the Applicant] and his situation.

17. On 20 October 2006, the Applicant's defense counsel replied with a letter enclosing the following materials: (i) legal opinions from attorneys in Germany, Greece, Spain, Switzerland and the United Kingdom certifying that those jurisdictions have no criminal law similar to the U.S. law on Structuring; (ii) the Applicant's Plea Agreement and the "Stipulated Statement of the Facts in Support of Guilty Plea"; and (iii) a legal opinion from an American immigration attorney stating that a Structuring conviction does not require automatic deportation under U.S. law. The defense counsel, however, did not provide any letter from the U.S. Attorney's Office confirming the views of the U.S. Attorney about the issue of deportation and the misdemeanor charge.

18. On the day of the Applicant's sentencing on 19 December 2006, he sent a long and emotional e-mail to HR and the Legal Department. In that e-mail, he described his upbringing and life struggle, as well as the devastating consequences of the investigation, and appealed to the Bank to maintain his employment.

19. A month later, on 31 January 2007, the HRSVP terminated the Applicant's employment effective 30 April 2007. In his letter to the Applicant, the HRSVP explained the basis of his decision as follows:

> I have reviewed the documents that you and your attorneys have submitted to the Bank arguing for the exercise of discretion not to terminate your employment. I understand that your personal circumstances appear to be very difficult and I, along with many other staff members who are familiar with your situation, feel much sympathy for you and your family. I spent many hours discussing the matter with knowledgeable colleagues in Human Resources, the Ethics Office, and the Legal Vice Presidency to ensure that in reaching a decision I took all appropriate factors into consideration. In the end, I have decided to proceed with termination of your employment for several reasons.
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> First, Staff Rule 8.01 (Disciplinary Proceedings) provides for mandatory termination of staff upon conviction of a felonious criminal offense. It allows for, but does not mandate, the exercise of discretion not to terminate a staff member.
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> Second, you pled guilty to a felonious offense that is a serious financial crime. In the Stipulated Statement of Facts in Support of Guilty Plea you signed on July 17, 2006, you acknowledged that a relative … specifically instructed you to split deposits made into your Credit Union account into amounts of less than $10,000 to avoid reporting requirements imposed by U.S. law, and that you complied with these instructions. You further certified to the U.S. District Court that at all times you "acted knowingly, unlawfully, purposely, and not by accident, inadvertence, mistake or other innocent reason." As a result, you were sentenced to 2 years of probation, fined $5,000, and ordered to perform 300 hours of community service. The statements that you have made under oath, as well as your conviction, are matters of grave concern for this organization.
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> Third, as a public international financial organization with a strong commitment to combating corrupt activity, the Bank is not in a position to employ an individual with a criminal record involving financial wrongdoing.

> Your job at the Bank involves public trust and requires complete confidence in your judgment and integrity. That confidence has been undermined by your conduct and the resulting felony conviction.
>
> Your attorneys have asked the Bank to exercise discretion under Staff Rule 8.01 (Disciplinary Proceedings), paragraph 3.02 not to terminate your employment because you were convicted of a crime that is a felony under the laws of the U.S., but may not be a felony in other countries. While the crime in question may not be a felony in most other countries, it is nonetheless a serious criminal offense, particularly for a person employed by a public international organization that holds its staff members to highest ethical standards. As a result, I have decided not to exercise discretion in this particular case.

20. The Bank agreed to allow the Applicant to file an application challenging his termination directly with the Tribunal – i.e., without first going before the Appeals Committee. He accordingly filed this application on 21 March 2007. As relief, he requests the following: (i) rescission of the termination decision and reinstatement as a Level G Senior Operations Officer; (ii) back pay and benefits from 1 May 2007; (iii) reimbursement of $48,000 in legal fees incurred in obtaining proof that Structuring is not a felony in other countries; (iv) compensation for intangible damage; and (vi) attorney's fees in the amount of some $25,000 for the proceedings before the Tribunal

Contentions of the Parties

The Applicant's Contentions that the HRSVP Failed to Exercise in a Proper Manner His Discretion Under Staff Rule 8.01, Paragraph 3.02

21. First, the Applicant contends that the discretion granted to the HRSVP by paragraph 3.02 was intended to cover precisely cases like the Applicant's since his conduct did not constitute a felony in most jurisdictions. Principle 2.1 of the Principles of Staff Employment commits the Bank to encouraging diversity in staffing and to taking necessary measures to protect the international character of the staff. Because Bank staff members work in multiple countries, enforcing mandatory termination in a case like the Applicant's could result in grossly unequal treatment of staff based in different countries. If the Applicant had been working in one of the Bank's country offices – for example, in London, Frankfurt, Geneva or New Delhi – and had done exactly the same thing as he did in Washington, D.C., his actions would not have jeopardized his employment with the Bank. The Applicant's case precisely fits within the exception embodied in paragraph 3.02 because the felony to which the Applicant pleaded guilty is not a crime – let alone a felony – in most other jurisdictions, including the Applicant's home country. Apart from the U.S., the only other country to which the HRSVP could point where Structuring may possibly be a crime is Australia. Even there, Structuring is not a felony. Accordingly, if paragraph 3.02 is to serve any purpose, it should be applied in cases like the Applicant's.

22. Second, the HRSVP justified his decision to terminate the Applicant on the basis that Structuring "is nonetheless a serious criminal offense." All felonies, however, are serious criminal offenses by definition. The language of the Staff Rule applies only to such serious criminal offenses. If the HRSVP were correct that it was inappropriate to exercise his discretion not to terminate the Applicant because he had pleaded guilty to a "serious criminal offense," it would never be appropriate for the HRSVP to exercise his discretion and the Staff Rule would be meaningless.

23. Third, the HRSVP considered termination an appropriate disciplinary measure when he mischaracterized Structuring as a "serious financial crime." Structuring is widely viewed as a technical, administrative violation of the highly complex regulations unique to U.S. banking law, an area in which the Applicant had no training or knowledge. The U.S. Board of Immigration Appeals concluded in *In re L-V-C-*, 22 I & N Dec. 594 (BIA 1999) that a conviction for Structuring does not require automatic deportation because it is not a crime of "moral turpitude" and "does not require evil intent, does not require knowledge of the illegality of the conduct, and does not inherently involve fraud upon the Government." Indeed, neither the judge nor the prosecutors in the Applicant's case considered the crime serious enough to warrant incarceration. Accordingly, the HRSVP's characterization of the crime as a "serious financial crime" was overreaching.

24. Fourth, the Bank asserts that the nature of the Applicant's offense was "particularly problematic for a person employed by a public international organization that holds staff to the highest ethical standards." But paragraph 3.02 can apply to a staff member only in a situation similar to that of the Applicant, i.e., to "a person employed by a public international organization that holds staff to the highest ethical standards," and who has committed a felony. Moreover, the Bank treated the Applicant differently than it treated former President Wolfowitz. Although the Bank found that Mr. Wolfowitz violated several Staff Rules, and generated damaging publicity worldwide, it permitted him to resign on his own terms. In contrast, the Bank terminated the Applicant although his case generated very little negative publicity and has long since been forgotten.

25. Fifth, the Applicant insists that the Bank's reliance on the Applicant's indictment violates due process and constitutes an abuse of discretion. The Bank attempts to defend its termination decision by stating that the Applicant's indictment was problematic for a public international organization "with a strong commitment to combating corrupt activity." The Bank's pleadings included an attached copy of the indictment, which is irrelevant to the proceedings before the Tribunal. This, the Applicant suggests, was an attempt to unfairly prejudice him. The Bank argues that the HRSVP "reasonably concluded that this confidence had been undermined by Applicant's conduct and resulting felony." But relying on the indictment was a gross violation of the most fundamental due process right: the right to be considered innocent until proven guilty. The Applicant was never found guilty of 22 of the 23 charges laid against him. Indeed, the government dismissed these charges. The Bank's attempts to revive them in order to justify the Applicant's termination is unacceptable. Thus, to the extent the HRSVP relied on the Applicant's indictment, he clearly abused his discretion.

26. Finally, the HRSVP's decision was arbitrary because he failed to consider important relevant factors. The Applicant has an excellent work record and his managers and colleagues hold him in high esteem. The Applicant has no authority in respect of the Bank's financial dealings. Moreover, in three cases (*Carew*, Decision No. 142 [1995]; *Planthara*, Decision No. 143 [1995]; and *Smith*, Decision No. 158 [1997]) the Tribunal overturned terminations where staff members had defrauded the Bank by knowingly claiming overtime to which they were not entitled, or by not using tax allowances to pay taxes despite certifying otherwise. The Applicant's case is more compelling than those of the applicants in these three cases because his offense had no direct impact on the Bank and he did not benefit in any way from the Structuring.

The Bank's Answer

27. The Bank insists that the fact that the Applicant provided information to the HRSVP indicating that Structuring is not a felony in certain non-U.S. jurisdictions did not obligate the HRSVP to exercise his discretion in the Applicant's favor. The language of paragraph 3.02 does not require the HRSVP to grant a reprieve from mandatory termination in cases where the act in question is a felony in one jurisdiction, but not in most other jurisdictions; he has "full and sole discretion" in this respect.

28. The Applicant seemingly would have paragraphs 3.01 and 3.02 supersede the broad power of the decision-maker to impose appropriate disciplinary measures pursuant to paragraph 3.03, which enumerates the types of disciplinary measures the HRSVP may impose. His arguments turn the concept of discretion upside down, ignoring the plain meaning of paragraph 3.02. While the HRSVP could not disregard the materials about non-U.S. jurisdictions provided by the Applicant while exercising his discretion, that information did not necessarily outweigh the other elements considered by the HRSVP.

29. Contrary to the Applicant's assertion, paragraph 3.02 does not establish the principle that "the Bank should not terminate a staff member because of a conviction under a law that does not apply in their home countries or in most countries." Rather, it provides no more than the possibility of imposing a penalty less severe than mandatory termination in certain circumstances. The decision remains within the sole discretion of the Bank, and is made in consideration of the totality of the circumstances, which include, but are not limited to, the laws in various jurisdictions.

30. Whatever explanations or justifications the Applicant or his lawyers may offer for his conduct, the HRSVP's

decision is based on facts in the public record. Those facts are as follows: (i) the Applicant was indicted on 23 criminal counts involving financial wrongdoing; (ii) he pleaded guilty to one count of Structuring, which constitutes a felony under U.S. law; (iii) as a consequence of his guilty plea, he was sentenced under U.S. law; (iv) the Applicant was aware that the deposits into and withdrawals from his private bank account were designed to evade U.S. reporting requirements; (v) this course of conduct dated back to 1998; and (vi) the Applicant was aware that his FCU account would likely not have come under the scrutiny of the U.S. Government because of his G-4 visa status and consequent tax-exempt status. The HRSVP also considered that the Bank is an international organization with a strong commitment to combating corrupt activity, and that public trust and complete confidence in staff judgment and integrity are required. The HRSVP reasonably concluded that this confidence had been undermined by the Applicant's conduct and his resulting felony conviction. He was therefore not prepared to exercise discretion in the Applicant's case.

31. That the crime was serious enough from the Bank's perspective to warrant termination is supported by: (i) the "Stipulated Statement of Facts in Support of Guilty Plea"; (ii) the Applicant's status as an international civil servant in an international financial institution; and (iii) Principle 3.1 of the Principles of Staff Employment, which mandates that staff members "have a special responsibility to avoid situations and activities that might reflect adversely on the Organizations."

32. As for the Bank's introduction of a copy of the indictment into the record, this was done for completeness. The Bank was not attempting to "revive" charges made in the indictment that did not form part of the Applicant's Plea Agreement. Nor did the HRSVP rely on the indictment in reaching his decision. It is clear from the plain language of the HRSVP's letter to the Applicant that he had before him two appropriate sources of material: (i) the Plea Agreement entered into by the Applicant in July 2006; and (ii) the legal opinions submitted by the Applicant and his defense counsel in support of the Applicant's argument for a favorable exercise of discretion that would prevent him from being terminated.

The Applicant's Contentions to the Effect that He Was Treated Unfairly

33. The Applicant argues that the Bank's actions violated the standards of fair treatment embodied in Principles 2.1 and 9.1 of the Principles of Staff Employment. First, it was unfair for the HRSVP abruptly to change his mind in September 2005 and place the Applicant on involuntary administrative leave. Nothing had changed between the HRSVP's recall of the Applicant from his voluntary administrative leave in May 2005 and September 2005 that would justify this change. The Bank's explanation to the effect that the Bank President's realization during the summer of 2005 that the Applicant had returned to work justified its decision rings false, given that: (i) the Applicant's indictment was a matter of public record and received media coverage; and (ii) the HRSVP never provided this explanation to the Applicant. Being forced to remain idle at home deprived the Applicant of the work he loved and caused him much anguish.

34. Second, the HRSVP's lack of sympathy for the Applicant's plight appears to be partly due to his failure to appropriately understand and weigh the Applicant's cultural background. In the Applicant's native culture, to question a request for a favor from an older family member who is a much-loved father figure would be unthinkable. Ignoring this cultural background makes the Applicant appear to have been foolish and irresponsible, but taking it into account changes the picture completely. Further, the Bank should not judge its staff solely according to the cultural norms of the U.S. based on its obligation in Principle 2.1 of the Principles of Staff Employment to "encourage diversity in staffing … and take [measures] to protect the international character of the staff." Therefore, the HRSVP's failure to give proper consideration to the Applicant's cultural background was unfair.

35. Finally, the Bank treated the Applicant unfairly when it encouraged him and his lawyers to undertake a very expensive research project on the law of non-U.S. jurisdictions in the hope that this would make it more likely that there would be a favorable outcome for him. The HR Manager who reported to the HRSVP advised the Applicant that the question of discretion arises "where it is shown that the act is a felony in one jurisdiction but not in another," and requested the Applicant's defense counsel to provide relevant legal opinions pertaining to countries in Europe. The Applicant and his counsel followed the HR Manager's advice and undertook such

research at an estimated cost to the Applicant of at least $48,000. Yet the HRSVP, while conceding that "the crime in question may not be a felony in most other countries," swept the information aside and counted it for naught.

36. The cost of performing this legal research significantly contributed to the Applicant's financial trouble, which in turn caused him to be unable to afford the legal cost of a trial during the U.S. Government's prosecution and forced him to enter into the Plea Agreement. If the HR Manager had not misled the Applicant, the Applicant would not have found himself in such dire financial straits that he was forced to abandon his fight to prove his innocence, forego a trial, and plead guilty. It was not fair of the HR Manager to mislead the Applicant in this manner.

The Bank's Answer

37. The Bank argues that the record does not support the Applicant's version of events concerning the Bank's decision in September 2005 to place him on administrative leave a second time. The HRSVP did not initiate the Applicant's "recall," as the Applicant puts it. Rather, the Applicant requested from his managers that he be allowed to return to work, and his managers forwarded the request to the HRSVP. It is incorrect that nothing changed between May and September 2005. The Bank's presidential administration changed as of 1 June 2005. The judgment of the new President's office was that, given the nature of the charges against the Applicant, it was best for him to remain on administrative leave until his legal proceedings were resolved. Under Article V, Section 5(b), of the Bank's Articles of Agreement, the President of the Bank has ultimate authority for the organization and management of Bank staff. The Bank can understand the Applicant's unhappiness at not being able to come to work, but the Applicant's own conduct had caused the situation in which he found himself. No issue of unfairness arises.

38. The Applicant's suggestion that a *sine qua non* for promoting diversity and protecting the international character of the Bank staff is consideration of the cultural backgrounds of individual staff members in the Bank's administration of its employment regime is without merit. The Bank has promulgated a uniform regime of Staff Principles, Staff Rules, and a general code of conduct to which all staff members are expected to adhere, irrespective of their cultural backgrounds. Nonetheless, the HRSVP made clear in his 31 January 2007 letter to the Applicant that he understood the Applicant's personal circumstances to have been difficult, that he and others acquainted with the Applicant's situation felt sympathy for the Applicant and his family, and that the HRSVP had spent many hours discussing the Applicant's case with HR, Ethics and Legal staff to ensure that all appropriate factors had been taken into consideration.

39. The Bank rejects the Applicant's contentions that the Bank was the moving force behind the legal research on non-U.S. jurisdictions undertaken by his defense counsel, that the Bank led the Applicant to believe that undertaking such research would save his job, and that the Bank played a part in the Applicant's decision to enter into the Plea Agreement. It was the Applicant's lawyers who understandably pressed the issue of whether the Applicant's actions would constitute a felony in other jurisdictions in the hope of securing a reprieve for their client from mandatory termination. The HR Manager advised the Applicant's lawyers of the provisions of paragraph 3.02 regarding the exercise of discretion in cases such as the Applicant's, but at no time did the HR Manager on his own initiative request legal opinions, as the Applicant alleges. Rather, the record shows that the Applicant's defense counsel offered to provide certain legal opinions, and the HR Manager accepted this offer on behalf of the Bank. The Applicant's assertion that the results of his lawyers' research were simply "swept aside" is without foundation. The HRSVP gave due consideration to all appropriate factors in reaching his decision.

Contentions of the Staff Association as Amicus Curiae
and the Parties' Comments Thereon

40. According to the Staff Association, the Tribunal should grant the relief which the Applicant seeks before the Tribunal for the following reasons. First, paragraph 3.02 was designed to ensure that staff members stationed in over 100 country offices around the world are not terminated when they are convicted of a felony which is not a

crime in most other jurisdictions. It is undisputed that Structuring is not a crime in most other jurisdictions. Accordingly, the Applicant's case comes within the exception embodied in paragraph 3.02, and the Applicant's termination was not proper. Second, if the Bank's decision not to grant relief from mandatory termination is upheld, the Staff Association worries that no other staff member will be able to avail himself or herself of relief under paragraph 3.02, and that the Rule will become meaningless. Finally, strong policy considerations support the Applicant's reinstatement. Given the international composition of the Bank, the intent of paragraph 3.02 is surely to ensure that staff members are not subjected to the laws and regulations of any one member country. To apply the above Staff Rule any other way could result in discriminatory treatment of staff based on where they currently work, and could be contrary to the Bank's values and commitment to diversity. To promote its commitment to institutional diversity, the Bank should have taken into account the Applicant's circumstances and exercised the discretion granted by paragraph 3.02 in the Applicant's favor.

41. In his comments on the Staff Association's Brief, the Applicant concurs with the Staff Association's position and urges the Tribunal to reinstate him.

42. The Bank opposes the Staff Association's arguments for the following reasons. First, the Staff Association ignores the clear language of paragraph 3.02 establishing that in two specified instances it is a matter of managerial discretion whether to impose a lesser disciplinary measure than the mandatory termination imposed under paragraph 3.01. The Staff Association appears to be operating under the same mistaken belief as the Applicant, namely that a showing that an act is a felony in one jurisdiction, but not in most others, *ipso facto* requires the exercise of discretion in the Applicant's favor. Second, the Staff Association's concern that if paragraph 3.02 is not applied in the Applicant's favor then no other staff member will be likely to find relief under the same paragraph is unwarranted. Had the felony for which the Applicant was convicted been completely divorced from financial impropriety, the outcome of his case might have been different. It was the financial nature of the Applicant's crime which tipped the balance of considerations against the exercise of discretion in his favor. Finally, the Staff Association incorrectly asserts that the intent of paragraph 3.02 is "surely to ensure that staff members are not subject to the laws, legal code and regulations of any one member country." Bank staff enjoy immunity only for their official acts, and do not enjoy the more comprehensive diplomatic immunity. In connection with their non-official acts, Bank staff are subject to the domestic laws of the country in which they reside, whether this is the U.S. or another country.

Considerations of the Tribunal

43. Paragraph 3.02 applies in cases where termination is otherwise mandatory. It gave the HRSVP, as the "President's designee," discretion to determine otherwise based on particular circumstances. The nature of that discretion is qualified by the emphatic adjectives "full and sole." The "particular circumstances" are given concrete illustrations:

> *i.e.,* where an act is a felony in one jurisdiction but not in most others, or where there has been a manifest lack of due process in the relevant case.

44. The Tribunal's authority in disciplinary cases is not limited to determining whether there has been an abuse of discretion. This case does not, however, involve a determination by the Bank that misconduct has occurred. When the Bank itself acts as the prosecutor for enforcement of its Rules regarding misconduct, it is readily understandable that judicial review cannot proceed on the basis that findings of culpability are matters of discretion. Here the misconduct has not been determined by the Bank but by U.S. authorities who have themselves been subject to national judicial review. Moreover, the Applicant pleaded guilty to a felony in court.

45. The Bank's role was thus limited to determining the consequences of the Applicant's criminal offense on his employment status in the Bank. The sanction under paragraph 3.01 is not a matter of discretion; termination of service is mandatory in case of "conviction of a felonious criminal offense."

46. Discretion enters the picture only as a possible exception to mandatory termination. If the Staff Rule did not contain this exception the mandatory measure would be a blunt instrument indeed, but fortunately, precisely

because of the exception, the Tribunal is not required to consider whether the mandatory nature of the disciplinary measure established under the law which it has been created to apply runs counter to some higher principle which no international tribunal could ignore.

47. Still, that law – i.e., the Staff Rule – provides that the exception is a matter for the "full and sole" discretion of the Bank's President or his designee. The question arises whether the Tribunal's authority is limited to determining whether there was an abuse of that discretion, or whether its authority is a wider plenary review of the measure, because it relates to a disciplinary matter. If the latter, it may be asked whether the Tribunal is entitled to ignore that the rule confers "full and sole" discretion as explicitly set down in the Rule.

48. This question need not be answered because it would make no difference. When paragraph 3.02 applies, and the finding of misconduct is made by a national law enforcement authority, the scope of review for abuse of discretion is not in fact materially different from that articulated as follows in *Mustafa*, Decision No. 207 [1999], para. 17:

> When reviewing disciplinary cases, the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offense, and (v) whether the requirements of due process have been observed.

49. In the light of the Staff Rule and the Applicant's guilty plea in the U.S. court the first three *Mustafa* elements are satisfied. (Indeed, given the Tribunal's disinclination to pass judgment on national courts' application of their own laws, they may be satisfied in all cases of a felony conviction.) Element (v) on due process is inherently a component of review for abuse of discretion. The remaining question is therefore "whether the sanction is not significantly disproportionate to the offense." Perhaps it is conceptually possible not to commit an abuse of discretion and nevertheless impose a "significantly disproportionate" mandatory disciplinary measure. But an examination of the Staff Rule relevant in this case excludes that possibility for the following reasons.

50. Consistently with *Mustafa*, paragraph 3.01 states that "[a]ny decision on disciplinary measures will take into account such factors as the seriousness of the matter, any extenuating circumstances, the situation of the staff member, the interests of the Bank Group, and the frequency of conduct for which disciplinary measures may be imposed." It appears these factors were intended to guide the HRSVP in the exercise of his discretion concerning what disciplinary measures to impose. Thus, if paragraph 3 is read in its full context, it is reasonable to conclude that in exercising his discretion under paragraph 3.02, the HRSVP should consider the factors listed in paragraph 3.01.

51. The parties in the present case have limited the scope of their submissions mainly to the question of whether the HRSVP properly exercised his discretion under paragraph 3.02. Even if the Tribunal were to explore the issue of proportionality, that issue would have to be resolved considering the factors set down in paragraph 3.01. In *Mustafa*, para. 28, the Tribunal stated:

> The Tribunal will next examine whether the sanction imposed on the Applicant was provided for in the Staff Rules of the Bank and whether it was disproportionate to the offense. Staff Rule 8.01 … provides for a series of disciplinary measures, the most serious of which is termination of appointment. Under this Staff Rule, the Bank imposes disciplinary measures on a case-by-case basis taking into account the seriousness of the matter, the extenuating circumstances, the situation of the staff member, the interests of the Bank and the frequency of conduct for which disciplinary measures may be imposed.

52. In sum, in considering whether the HRSVP properly exercised his discretion under paragraph 3.02, or whether the termination was disproportionate in this case, the factors stated in paragraph 3.01 must be taken into account.

53. Before examining the five illustrative factors enumerated in paragraph 3.01, it is necessary to record the Tribunal's rejection of the assertions of the Applicant and the Staff Association to the effect that paragraph 3.02

operates to ensure that staff members are not subject to the laws of any one member country. Principle 3.3 of the Principles of Staff Employment makes it clear that whatever the privileges and immunities staff members may enjoy "in the interests of their Organizations," they "shall not excuse staff members from the performance of their private obligations or from the due observance of the law."

54. What may be conveniently referred to as the *3.01/Mustafa* factors may now be examined.

The Seriousness of the Matter

55. Under the U.S. Code, Structuring carries potential penalties of a maximum five years imprisonment, a $250,000 fine, and three years of supervised release.

56. In an attempt to downplay the seriousness of the offense, the Applicant has introduced U.S. court decisions concerning the deportability of immigrants convicted of Structuring. True enough, a U.S. Court of Appeals and the U.S. Board of Immigration Appeals have held that Structuring does not involve "moral turpitude" and is not "inherently fraudulent." Still, it is an unattractive argument. The question for the Bank is not whether a staff member has conducted himself so poorly that he is subject to deportation; that is surely setting the bar far too low when the issue is whether the Applicant's conduct is compatible with the standards of his position as a Senior Operations Officer in an international financial organization.

57. In the deportation cases, clemency was shown because the convicted immigrant had not acted with a necessary "evil intent" to commit the defined crime of fraud, involving illicit financial gain. Still, Structuring is a crime, and it involves the intent to avoid a reporting requirement. Indeed, Structuring is often linked with money laundering. In *In re L-V-C-*, 22 I & N Dec. 594 (BIA 1999), the Board of Immigration Appeals observed that "Section 5324 [Prohibition on Structuring] was enacted as part of the Money Laundering Control Act of 1986 in an attempt to prevent the laundering of large amounts of ill-gotten currency." Since the Bank is actively involved in the prevention of money laundering, it was not unreasonable for it to conclude that Structuring is a serious financial crime.

58. This conclusion is strengthened by the fact that the Applicant's "Stipulated Statement of Facts in Support of Guilty Plea" reveals that he engaged in Structuring over a period of three years.

The Extenuating Circumstances

59. According to the Applicant, the Bank failed to understand and weigh the Applicant's cultural background appropriately. He argues that, in his native culture, to question a request for a favor from an older family member who is a much-loved father figure like his cousin would be unthinkable.

60. According to the Bank, it has put in place an extensive and uniform regime of Staff Principles, Rules, and a code of conduct to which all staff members are expected to adhere regardless of their cultural backgrounds. The Bank adds that it did consider the Applicant's personal circumstances, but concluded that this factor cannot outweigh all other factors, such as the risk to the reputation of the institution.

61. In the "Stipulated Statement of Facts in Support of Guilty Plea," the Applicant certified that "[a]t all times, with respect to the conduct described in this Stipulated Statement of Facts, [the Applicant] acted knowingly, unlawfully, purposefully, and not by accident, inadvertence, mistake, or other innocent reason." The Applicant's claims of innocent explanations are implausible. Moreover, the Applicant has lived in the U.S. since arriving in 1988 at age 17, pursued his Bachelors degree in Washington, D.C., worked in the Bank in Washington, D.C. since 1993, and yet engaged in Structuring beginning only in 1998. Deference to Mr. X on the basis of cultural expectations is not an acceptable argument from someone of the Applicant's background and seniority.

The Situation of the Staff Member

62. Under this heading, the Tribunal may consider a staff member's contributions and performance. *See D*,

Decision No. 304 [2003], at paras. 52-53. According to the Applicant, the HRSVP did not give proper weight to the Applicant's excellent work record during his 13 years at the Bank, or to the very high esteem in which the Applicant's managers and colleagues hold him. The Bank, on the other hand, argues that the HRSVP took into account all factors relevant to the Applicant's situation, and spent many hours discussing the Applicant's case with HR, Ethics and Legal staff to assure that all appropriate factors were taken into account in reaching a decision.

63. In *D*, the Tribunal observed that the good ratings of a staff member's performance by his or her immediate supervisors and colleagues "cannot of course bind the judgment and discretion of those higher managers within the Bank Group who are responsible for upholding ethical standards on a Bank-wide basis and considering the imposition of disciplinary measures." *Id.* at para. 53. Similarly, in *Kwakwa*, Decision No. 300 [2003], the applicant's able performance was not sufficient to overcome the consequences even of an isolated instance of financial impropriety.

The Interests of the Bank Group

64. The Bank argues that it is in the interests of the Bank Group to terminate the Applicant in view of the following factors: (i) the Bank is committed to combating corrupt activity, and is thus not in a position "to employ an individual with a criminal record involving financial wrongdoing"; and (ii) the Applicant's job at the Bank involves public trust and requires complete confidence in the Applicant's judgment and integrity, but that confidence has been undermined by the Applicant's conduct.

65. The Applicant, on the other hand, argues that the interests of the Bank Group were not affected by his actions because his responsibilities at the Bank did not involve the financial dealings of the Bank.

66. The management of the Bank must be given a margin of appreciation in determining what is in the interests of the Bank Group. As just noted, in *D*, the Tribunal said that it is more likely to give deference to the views of higher management who are responsible for upholding the ethical standards of the Bank. Here, however, the Staff Association, another stakeholder in the Bank Group, argues that it would be in the interests of the Bank not to terminate the Applicant.

67. When staff members are involved in a crime, international administrative tribunals give considerable deference to the management's evaluation of institutional interests. For example, the International Labour Organisation Administrative Tribunal held in its Judgment No. 49 [1960], *In re Duncker*, that termination on account of a suspended sentence of two months pronounced by the *Pretore* of Venice for an act of public indecency did not give rise to reinstatement notwithstanding the staff member's insistence on his confidence in prevailing on appeal and, subsequently, on the annulment of his condemnation by a general presidential decree of amnesty. The provisions of the Administrative Manual of the Organisation under which he was terminated provided for sanctions for conduct detrimental to the Organisation and serious violations of applicable national law. In rejecting his application for reinstatement, the tribunal stated:

> [I]n refusing to comply with [the applicant's] request for reinstatement on the basis of the amnesty covering the sentence that had led to the termination of his appointment, the Director-General, far from acting improperly, confined himself to exercising his right to assess the suitability of complainant, as of any other applicant, for employment in the Organisation[.]

The Frequency of Conduct

68. The Applicant had no prior convictions or adverse disciplinary findings before his conviction on a single felony count of Structuring. The "Stipulated Statement of Facts in Support of Guilty Plea," however, makes clear that the Applicant engaged in the underlying conduct of Structuring more than once, as is clear from the extract quoted in Paragraph 8 above.

69. In sum, in view of the provisions of paragraph 3 of Staff Rule 8.01 and the totality of the circumstances, the

Tribunal sees no basis on which to rescind the decision of the HRSVP. It accepts the Bank's argument that

> [a]lthough cognizant of and sympathetic with Applicant's personal circumstances, Respondent had to balance these institutional concerns and realities, namely that the Bank is a public international financial institution operating very much in the public eye with a well-publicized and strong emphasis on and commitment to combating corrupt activity. After extensive internal consultation and weighting all factors, [the HRSVP] judged that the Bank could not continue to employ an individual with a criminal record involving financial wrongdoing ….
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> …
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> [Considering the Bank's] strong commitment to combating corrupt activity and that public trust and complete confidence in staff judgment and integrity is required, [the HRSVP] reasonably concluded that this confidence had been undermined by Applicant's conduct and resulting felony conviction to an extent that he was not prepared to exercise discretion in Applicant's case.

70. The core factor favoring the Bank is that the Applicant's felony conviction involved a financial crime. Structuring is often linked with corruption and money laundering. The Bank has in recent years devoted significant resources to combating corruption and money laundering. It would be discordant for the Tribunal now to compel the Bank to retain a staff member convicted of the felony of Structuring. In the end, despite the Applicant's difficult circumstances, the Bank has convincingly argued as follows:

> Had the felony for which Applicant was convicted been completely divorced from financial impropriety, the outcome in his case could conceivably have been different. … [I]t was the financial nature of the felony to which Applicant pled guilty which tipped the balance against the exercise of discretion in his favor.

71. The Tribunal now turns to incidental contentions that have not already been dealt with in the systematic review undertaken above.

72. The Applicant argues, with support from the Staff Association, that with respect to acts which do not constitute a felony in "most" jurisdictions paragraph 3.02 must apply if it is to have any meaning. In other words, once the Applicant had made his uncontested demonstration that Structuring was not a felony in most other countries he surveyed, the Bank had to "determine otherwise" (in the words of paragraph 3.02) than the measure of termination.

73. The Tribunal disagrees. Numerous factors might justify clemency in other cases, but do not apply to the Applicant. Acts deemed to be criminal under the unusual laws of a particular country may have nothing to do with the work of the Bank. Or the penal legislation itself may be odious, such as the criminalization of religious, political, or artistic expression. The staff member may be a recent arrival in the country where his or her conduct triggers unexpected national penal sanctions. Indeed, he or she may be on a temporary assignment in a country where, for example, presence at a private gathering where alcohol is consumed – even if only by others – is a criminal offense. Or the staff member may be a clerical worker or driver whose lack of awareness and punctiliousness in respect of laws regulating financial transactions cannot be said to bring the Bank into disrepute. In this case, the Applicant was a Senior Operations Officer who had moved to the U.S. at age 17 and had made his adult and professional life there without interruption. His insensitivity to local law is not readily excusable, particularly with respect to the rather obvious warning lights that he plainly should have perceived when asked to make ostensibly pointless transactions in and out of his bank account – which moreover is the account of a World Bank staff member exempt from U.S. income tax and therefore less subject to IRS audits.

74. The Applicant's fourth and fifth arguments (see Paragraphs 24-25 above) seek to invalidate the HRSVP's decision by arguing that he received unequal treatment, and going so far as to say that the Bank's pleadings before this Tribunal "violates due process and constitutes abuse of discretion." This is wholly misconceived. The Tribunal's concern is to determine the legitimacy of the challenged decision, which can be neither

established nor nullified by what the Bank says about it in a subsequent legal challenge. In this connection the Applicant's reference to the circumstances of Mr. Wolfowitz's departure from the Presidency of the Bank is inapposite. The Applicant does not document this attempted comparison. Even if discrimination or arbitrariness were demonstrable with reference to a single comparator, at least that comparator must have been concerned by the application of paragraph 3.02. Mr. Wolfowitz was not.

75. The Applicant suggests that the HRSVP should have been influenced by the clemency indicated by the Tribunal's decisions in *Carew*, Decision No. 142 [1995], *Planthara*, Decision No. 143 [1995], and *Smith*, Decision No. 158 [1997], where terminations were overturned even though those applicants had defrauded the Bank.

76. There are several flaws in this argument. First and foremost, none of these cases involved paragraph 3.02.

77. Secondly, these cases are distinguishable on their facts. Mr. Carew and Mr. Planthara were assistants in the Printing and Graphics Division of the General Services Department. They had made multiple fraudulent overtime claims. In considering termination to have been disproportionate, the Tribunal stressed the modest amount of money involved as well as the fact that the applicants did not have management responsibilities. Mr. Smith also worked in the General Services Department; his misconduct was not that he had made unfounded claims, but that he had falsely certified that he had used his tax allowance to pay U.S. taxes when in fact he had been delinquent. On the other hand, he and his wife had, without prompting from the Bank, entered into an agreement with the IRS to pay his arrears on installment, and there was no question but that he would ultimately have to satisfy the taxman.

78. Thirdly, these three cases may not have been decided the same way today. During the time when the staff members in these cases committed misconduct, there was no mandatory termination under Staff Rule 8.01. The November 1996 revision introduced mandatory termination for the following acts:

> a. misuse of Bank funds or other public funds for private gain in connection with Bank activities or employment, or abuse of position in the Bank for financial gain; or
>
> b. criminal offenses defined under applicable law as felonious acts.

79. Had these three cases been presented to the Tribunal after the amendment to Staff Rule 8.01, the Tribunal might have decided them differently.

80. Cases applying the revised Staff Rule 8.01, which provided for mandatory termination, evidence considerable firmness on the part of the Tribunal. In *Kwakwa*, Decision No. 300 [2003], the Tribunal found that the applicant had committed misconduct by: (i) accepting remuneration from an IFC client while in the service of the IFC; and (ii) abusing his position in the Bank for financial gain. The Tribunal upheld the Bank's decision to terminate the applicant.

81. In *Ismail*, Decision No. 305 [2003], the Tribunal found that the applicant: (i) had participated in a fraudulent scheme to contravene established institutional procurement policies in order to favor a specific company; and (ii) had abused his position in the Bank for financial gain by accepting from that company either free or discounted materials and labor in exchange for favoritism. In that case, the Tribunal again upheld the Bank's termination decision, stating at paras. 72-73:

> Under Staff Rule 8.01, paragraph 4.01(a), termination of service is mandatory when it has been determined that there has been abuse of position in the Bank for financial gain. In the present case, the Applicant's abuse of his position for financial gain was clearly established. Despite the Applicant's length of service and good performance reviews, he had, over a period of years, failed to act in accordance with the responsibility which had been entrusted to him; instead he had personally benefited from his failure to follow appropriate procedures. In addition, he had tried to cover up the default and to blame others.
>
> Under paragraph 4.02 of Staff Rule 8.01, a manifest lack of due process is a factor which might lead the

> Bank in its discretion not to determine upon the otherwise mandatory sanction of dismissal. In this case, the Tribunal has concluded that the procedures followed by the Bank were not in accordance with the requirements of due process in two respects, first in relation to the translation services provided by the Applicant's supervisor, and second in failing to provide to him its Clarification Document to his Comments on the Draft Investigation Report. However, after examining all the facts and evidence, the Tribunal concludes that these procedural irregularities do not negate the validity of the Bank's determination to terminate the services of the Applicant.

82. As for the Applicant's contentions with respect to alleged unfair treatment (see Paragraphs 33 *et seq.* above), their relevance to the remedy sought (reinstatement) is unclear; at most they would lead to monetary recovery. They are at any rate unfounded for the following reasons.

83. The Applicant argues that the Bank treated him unfairly when the HRSVP recalled him from his paid administrative leave in May 2005, but abruptly changed his mind in September 2005 and put him back on leave. Yet the Applicant has not rebutted the Bank's assertion that the HRSVP recalled the Applicant at the Applicant's request, forwarded to him by the Applicant's immediate managers. With respect to placing the Applicant back on administrative leave, it is a matter of record that the presidential administration changed as of 1 June 2005. The Bank does not seem to have violated any Staff Rules by placing the Applicant back on administrative leave at the instruction of the incoming President of the Bank. Staff Rule 8.01, paragraph 4.07, states:

> The Vice President, Human Resources for the Bank, or a Managing Director, may place a staff member on administrative leave pending completion of an investigation. Administrative leave can last up to six months, and can be extended when the Vice President, Human Resources for the Bank determines that additional time is needed to complete an investigation. A staff member will be notified in writing of the decision to place a staff member on administrative leave, the reason for the decision, and the duration of the administrative leave.

84. The Staff Rule gives the Bank discretion, exercised by the HRSVP or a Managing Director, to place a staff member on administrative leave pending completion of an investigation. This discretion may be exercised at any time during the investigation. The decision may be revoked or reinstated depending on the circumstances. In this case the Applicant has not shown that the discretion was exercised improperly or indeed that it caused him any harm as he continued to draw his salary.

85. In any event, the Tribunal will not readily second-guess the Bank's decision to place on administrative leave a staff member who is under investigation. In *G*, Decision No. 340 [2005], the Tribunal stated at paras. 67-69:

> [T]he Tribunal has … stated that placing a staff member on administrative leave under Staff Rule 8.01 is, in itself, not a disciplinary measure. If a decision to impose administrative leave is challenged, the Tribunal will consider whether the decision was an abuse of discretion – while still acknowledging that it is indeed a matter of discretion. (*Ismail,* Decision No. 305 [2003], para. 54.)
>
> …
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> The Tribunal sees no reason to question the Bank's decision that it was not feasible to assign the Applicant to alternative tasks not involving financial responsibility. Such tasks were at the heart of the Applicant's entire department; alternative occupations for someone of her seniority may not, as the Bank contends, have been available. Indeed, her managers might have taken the view that such an assignment would have the potential of creating greater embarrassment to the Applicant as questions would have been asked by a wider circle of colleagues as to the underlying reason. At any rate, this is the type of managerial determination the Tribunal is not called upon to second-guess.

86. The Applicant goes on to argue that the Bank treated him unfairly because: (i) it encouraged his defense counsel to conduct research on whether Structuring was a felony in other jurisdictions, but ultimately ignored the findings of the research; (ii) its letter of 19 September 2006 stated that it would give due consideration to the findings of the research, but in fact it did not do so when the findings were presented; and (iii) the research cost the Applicant $48,000, effectively forcing the Applicant to enter into the Plea Agreement.

87. The correspondence of the HR Manager with the Applicant's defense counsel is described in detail in Paragraphs 14-17 above. From the correspondence, it cannot be reasonably concluded that the Bank unduly encouraged the Applicant to engage in research, or that it gave the Applicant any promise or improper hope. To the contrary, for the HR Manager to have rebuffed the Applicant's offer would have exposed him to valid criticism. The Applicant was entitled to seek the benefit of paragraph 3.02, and the HR Manager properly welcomed the submission of materials that were germane to the HRSVP's decision, and were possibly favorable to the Applicant. The record certainly does not show that the Bank played a part in the Applicant's decision to enter into the Plea Agreement. In any event, the record, and particularly the HRSVP's letter of 31 January 2007, satisfies the Tribunal that the HRSVP did consider the findings of the Applicant's research, but decided not to exercise his discretion in the Applicant's favor.

88. In sum, considering the Bank's treatment of the Applicant as a whole, it cannot be concluded that the Bank treated the Applicant unfairly. At all times, the Applicant was on administrative leave and received full payment. The termination decision taken on 31 January 2007 was made effective on 30 April 2007, thus giving him three additional months' pay. In addition, subsequent to his departure from active service, the Bank paid the Applicant two *ex gratia* payments totaling about $20,000 to help with the Applicant's medical bills and to lessen his other financial burdens.

Costs

89. Given that the text of paragraph 3.02 has not previously been examined by the Tribunal, that its full implications are not self-evident, and that the Applicant's case was not frivolous when viewed as a matter of his employment status as opposed to the characterization of his conduct under U.S. federal criminal law, the Tribunal considers it appropriate to award him $24,000 as a contribution to his costs.

Decision

For the above reasons, the Tribunal decides that:

(i) the Respondent shall pay the Applicant a contribution of $24,000 to his costs; and

(ii) all other pleas are dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Zakir Hafez
Zakir Hafez
Counsel

At Washington, DC, 14 December 2007